No. 98-1662

In The

Supreme Court of the United States

October Term, 1998

CALIFORNIA,

Petitioner,

v.

HODARI D.

On Writ Of Certiorari To The Court Of Appeal Of The State Of California, First Appellate District

RESPONDENT'S BRIEF ON THE MERITS

James L. Lorenzen
(Appointed by this Court)
1600 Shattuck Avenue
Suite 200-4
Berkeley, CA 94709
Telephone: (415) 486-0612

Counsel for Respondent

Of Counsel:

J. Bradley O'Connell
Staff Attorney
First District Appellate Project
730 Harrison Street
Suite 201
San Francisco, CA 94107
(415) 495-3119

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QUESTIONS PRESENTED

1. Whether this Court should change the test for a seizure under *Mendenhall* and *Chesternut* to require an actual physical restraint of a fleeing suspect.

2. Where an individual discards evidence in the course of an illegal detention and there are no intervening circumstances, is the discarded evidence a fruit of the illegal detention?

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OPINIONS BELOW

The opinion of the California Court of Appeal, First Appellate District was reported at *In re Hodari D.*, 216 Cal.App.3d 745, 265 Cal.Rptr. 79 (1989). A copy of the opinion is in the Joint Appendix at J.A. 126-145. On March 15, 1990, the California Supreme Court denied review of the opinion but ordered the opinion to be depublished. A copy of the order of denial appears in the Joint Appendix at J.A. 146.

JURISDICTION

The California Supreme Court denied review of the Court of Appeals decision on March 15, 1990. Under California Rules of Court sections 24(a), 25(a) and 28(f), the Court of Appeal opinion then became final and reviewable by this Court.

A petition for writ of certiorari was filed on April 18, 1990, within 90 days of the denial of review by the state supreme court. Supreme Court Rules, rule 13.1 On October 1, 1990, this Court granted certiorari.

This Court's jurisdiction is invoked under 28 U.S.C. section 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

"The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . "

STATEMENT

A. The Underlying Facts.

On April 18, 1988, at approximately 10:00 p.m., Officers McCoglin and Pertoso of the Oakland Police Department's Narcotics Task Force were patrolling in an unmarked brown Dodge in the area of 63rd avenue in Oakland. (Joint Appendix (J.A.) 27.) They were wearing blue jackets with "police" written on the front and back, blue jeans, tennis shoes and gun belts. (J.A. 26.) Both officers were familiar with this area because it was reputedly "an area with high narcotic activity." (J.A. 28.) The officers had participated in narcotic arrests in this area before. (J.A. 28.).

The officers turned southbound on 64th Avenue, where they saw four young black males standing around a red compact car which was parked along the curb. (J.A. 27.) The officers were approximately 40 yards away. (J.A. 39.)

Both officers believed they had interrupted some kind of narcotic activity. (J.A. 40.) However, neither officer, prior to appellant's arrest, saw any money or drugs being exchanged. (J.A. 43.) As they turned southbound, "a couple of the guys looked up towards" the officers. (J.A. 39.) Two of the young men ran south on 64th Street, and the other two young men ran westbound to the rear

of an abandoned house. (J.A. 39.) The red car departed southbound "at a high rate of speed." (J.A. 39.) The officers did not recognize any of the individuals. (J.A. 35, 40.)

Officer Pertoso got out of the car to give chase, but he was unable to see any of the faces of the individuals because they were out of sight. (J.A. 41.)

Officer Pertoso ran northbound on 63rd and then westbound on Foothill. (J.A. 41.) Officer McCoglin then drove around the block in an effort to catch them. (J.A. 36.) Officer Pertoso was running to try to cut them off in order to detain these individuals and "find out what they were about." (J.A. 44.) As Officer Pertoso was trying to cut them off, he encountered Hodari running towards him and looking over his shoulder as if someone was following him. (J.A. 41.) Hodari had a startled look on his face when he saw the officer running towards him. (J.A. 46.)

When they were approximately 11 feet apart, he saw Hodari "in a underhand scooping motion"discard a single loose rock, alongside of a house. (J.A. 41-42.) Hodari continued toward Officer Pertoso, who forced Hodari to the grass and handcuffed him. (J.A. 42.) Officer Pertoso recovered the discarded object, which turned out to be rock cocaine. (J.A. 42-43.)

Officer McCoglin then conducted a search of the area along with the other individuals had run, and he found a clear plastic sandwich bag that contained approximately 15 of white chunks of suspected cocaine. (J.A. 31.) He never did see the bag with approximately 15 rocks in anyone's possession. (J.A. 36.)

B. The Juvenile Court Proceedings.

On April 20, 1988, a petition under California Welfare and Institutions Code section 602 alleging a violation of Health and Safety Code section 11350 (possession of cocaine for sale) was filed. (J.A. 1-2.)

On May 2, 1988, Hodari filed a motion under Welfare and Institutions Code section 700.1 to suppress all physical evidence seized as a result of his detention. (J.A. 3-17.)

On May 19, 1988, the juvenile court found that the chase was illegal and that the police officers did not have a right to chase him or to detain him. (J.A. 55.)

After the juvenile court expressed concern about the nexus between the illegal chase and the evidence, it denied Hodari's motion to suppress. (J.A. 56, 94, 118, 130.)

On May 20, 1988, Hodari's contested jurisdictional hearing was held, and the juvenile court found the alleged violation of Health and Safety Code section 11350 to be true. (J.A. 94-111.)

On June 6, 1988, Hodari's dispositional hearing was held and the juvenile court ordered Hodari to a commitment at Los Cerros Camp. (J.A. 112-116, 122-124.)

On June 13, 1988, Hodari filed a timely notice of appeal. (J.A. 125.)

C. The State Appellate Opinion.

On December 15, 1989, the California Court of Appeal, First Appellate District, in a published opinion, reversed the judgment of the juvenile court. (J.A.

126-145.) The Court of Appeal found that the evidence offered in support of the petition had been obtained as the result of the illegal seizure of Hodari. (J.A. 143-144.) The Court of Appeal applied the definition of a seizure as set forth in *United States v. Mendenhall*, 446 U.S. 544 (1980) and *Michigan v. Chesternut*, 486 U.S. 567 (1988). (J.A. 132.) The Court of Appeal held that a reasonable person in Hodari's position would not feel free to leave, when confronted with Officer Pertoso's act of running directly at him.

> We have no doubt that it is coercive and intimidating to discover a police officer running directly toward one, some 11 feet away on a public sidewalk. Indeed, the sight of a running officer, even without a command to halt, would reasonably convince most citizens that they were not free to ignore the officer and leave . . . This case involves more than a pursuit, as Officer Pertoso did not pursue appellant, but ran in such a fashion as to cut him off and confront him head on. (J.A. 133-134.)

The Court of Appeal upheld the trial court's finding that the police officers had no reasonable grounds to detain him before he discarded the rock. (J.A. 138-140.) The Court of Appeal also found that the state conceded that issue. (J.A. 138.)

The Court of Appeal also disagreed with the juvenile court's ruling that Hodari's act of discarding the rock was not the "fruit" of Officer Pertoso's unlawful seizure.

> Where the police illegality involved is running head on at a suspect in an effort to stop him, we cannot see how the suspect's immediate discard of contraband can be anything other than a direct result and exploitation of the illegality.

> There were no intervening circumstances; the officer's stated purpose in pursuing appellant was to stop him because of a hunch that illegal narcotic activity had taken place. The officer's acts were unfounded, as he admitted he originally saw nothing suspicious other than the four Black youths standing near a car. Appellant's act of abandoning the evidence when confronted with the running officer in his path was not a mere coincidence . . . To say the police did not obtain the evidence through exploitation of their illegal activity would be a fiction. (J.A. 142-143.)

The Court of Appeals held that the juvenile court erred in denying the motion to suppress, and had the wardship reversed. (J.A. 144.)

On March 15, 1990, the California Supreme Court denied the state's petition for review and ordered the opinion not to be published in the official reports. (J.A. 146.)

SUMMARY OF ARGUMENT

1. Petitioner, along with the Solicitor General and other amicus curiae, is seeking to change the law of search and seizure in this case. They desire that this Court impose a "bright-line" rule governing seizures in place of the test this Court has consistently used. In order for petitioner and Amici to effectuate such a change, and in order to argue that they are not really seeking a *change* in the law, they are forced to misread this Court's holdings in *Terry v. Ohio*, 392 U.S. 1 (1968), *United States v. Mendenhall*, 446 U.S. 544 (1980), *Michigan v. Chesternut*, 486 U.S. 567 (1988) and *Brower v. County of Inyo*, ___ U.S. ___, 103 L.Ed.2d 628 (1989). Indeed, they must give a patently incorrect reading of this Court's opinion in order to effectuate the major change in the law they wish to bring about.

Petitioner contends that no Fourth Amendment detention occurs unless there has been an actual physical restraint or termination of movement. Petitioner asserts that this position is not foreclosed by *Chesternut* and goes so far as to characterize it as "faithful" to the analysis of *Chesternut*. In fact, petitioner is advancing exactly the "bright-line" rule which this Court squarely rejected in *Chesternut*. There the Court refused to hold that no detention occurs until a fleeing individual stops in response to the police show of authority. Instead it adhered to its "traditional contextual approach," which looks to whether a reasonable person would have believed he was not free to leave.

Petitioner attempts to extract a physical restraint requirement from *Brower v. County of Inyo*, ___ U.S. ___, 103 L.Ed.2d 628, 1989. Yet, *Brower* was a civil rights case involving a fatal collision into the police roadblock. It has no bearing whatever upon the moment at which a police chase or cutting off of a suspect becomes a detention. Indeed, the issues posed in *Brower* are so different from those in chase or cut off cases such as this, the *Brower* opinion has no occasion even to refer to the Court's leading chase case, *Chesternut*.

This case simply represents one state court's application of the proper test – *Mendenhall-Chesternut* – to a particular set of facts. The Court of Appeal did not treat

any single fact as dispositive, but, viewing all the circumstances, concluded that a reasonable person in Hodari's position would not feel free to leave. Among other factors, the Court found that, in cutting off Hodari's path, and running directly at him from only 11 feet away, the police conduct here was substantially more coercive and intimidating than that involved in *Chesternut*.

Petitioner's criticisms and second-guessing of the Court of Appeal's characterization of the facts amount to no more than an invitation to this Court to micro-manage state courts' fact-specific applications of the *Mendenhall-Chesternut* standard. Yet, just last term, in another Fourth Amendment case, *Minnesota v. Olson*, ___ U.S. ___, 110 S.Ct. 1684 (1990), this Court stated that it would not disturb a state reviewing court's application of the proper constitutional standard to a particular set of facts. Since the Court of Appeal here applied the correct standard, *Mendenhall-Chesternut*, the same considerations of federalism underlying *Olson* call for a similar result here.

2. Petitioner also argues that evidence discarded at the very moment of an illegal seizure is, paradoxically, not a fruit of that illegality. Petitioner's analysis is flawed from the start. Petitioner erects a straw man: The state assumes that discarded contraband cannot be deemed the fruit of an illegal detention unless it can be said that an illegal search of the person would necessarily have followed the illegal detention. Petitioner then proceeds to analyze the discard issue on the basis of this odd premise. In fact, such speculation as to the likelihood of further illegal intrusions has no role in the analysis of whether evidence is a fruit of an illegal seizure. Instead, this Court's cases such as *Wong Sun v. United States*, 371 U.S.

471 (1963) and *Brown v. Illinois*, 442 U.S. 590 (1975) require an analysis of whether the evidence has been "come at" by "exploitation of the illegality" and whether there are any "intervening circumstances" severing the link between the illegality and the evidence.

Where an individual discards evidence at the very moment he is confronted by an illegal police show of authority or use of force, there clearly is no intervening circumstance purging the taint. In this situation, the evidence is obtained contemporaneously with and as a direct result of the illegal detention. There could be no more clear example of evidence come at by exploitation of the illegality.

Not surprisingly, state and federal cases throughout the country have recognized that contraband discarded during an illegal detention is a fruit of that illegality and is subject to the exclusionary rule. Indeed, to pretend otherwise, as the petitioner would have this Court do, would frustrate the deterrent purposes of the exclusionary rule. As the many cases on this subject reflect, it is quite predictable that an individual confronted with an illegal police detention would panic and discard contraband. However, the rule urged by the state would remove *all* these cases from the purview of the exclusionary rule. There would be no remedy for illegal police conduct which panics an individual into discarding evidence. With no remedy, there would be no deterrent, and the withdrawal of the exclusionary rule from these situations would effectively reward this form of illegal police conduct.

ARGUMENT

I

HODARI WAS SEIZED UNDER THE FOURTH AMENDMENT

This case concerns the limits of coercive police behavior under circumstances where the police concededly lack the reasonable suspicion basis necessary for an investigative stop under *Terry v. Ohio*, 392 U.S. 1 (1968).[1] Here, one of the police officers blocked Hodari's path and ran directly at him from a distance of 11 feet.

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[1] Two Amicus briefs (Brief Of The Appellate Committee Of The California District Attorneys Association and Brief For The United States) on behalf of petitioner are raising the issue of whether Hodari's flight from the police equates to a reasonable suspicion of wrongdoing.

This issue is not before the Court. The petitioner has conceded in the Court of Appeal that the police officers did not have a reasonable suspicion of any wrongdoing by Hodari. (J.A. 138.) Moreover, the petitioner did not raise this issue in his petition for certiorari.

The District Attorneys Association's brief states that "*Amicus* is mindful of the prohibition against presenting additional information in an *amicus curiae* brief. [Citations omitted.] However, it is the position of *amicus* that this prohibition does not apply in the instant case in that the issue of reasonable suspicion was discussed below and has been raised by the respondent in this Court." (District Attorneys Brief p. 5, n. 1.) The District Attorneys Association then cites to pp. 8-23 of Hodari's brief in opposition to the petition to certiorari. Pages 8-23 of Hodari's brief in opposition to the petition for certiorari is the *entire* argument section of the brief. Amici's citation is misleading and amici's assertion is patently untrue. This Court has refused to consider issues in *amicus curiae* that were not

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Not surprisingly, the Court of Appeal, applying the "reasonable person" standard dictated by *Michigan v. Chesternut*, 486 U.S. 567 (1988), concluded that, in view of all the circumstances, a reasonable person confronted by this police conduct would not feel he was free to leave and go on his way. On these facts, that conclusion is unassailable, so the state has concentrated on a different tack. The petitioner's main argument is that notwithstanding *Chesternut's* rejection of such a "bright-line" standard, there was not detention here since there had not yet been a "physical restraint" or "termination of

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raised in the Court of Appeal or in the petition for certiorari. In *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981), and numerous other cases, this Court refused to consider an argument raised by *amicus* since it was not raised by the parties below. *Id.* at p. 60, n.2. See also *Bell v. Wolfish*, 441 U.S. 520, 530, n.13 (1979); *Knetsch v. United States*, 364 U.S. 361, 370 (1960); *Equal Employment Opportunity Commission v. Federal Labor Relations Auth.*, 476 U.S. 19 (1986); *DeShaney v. Winnebago County Dept. of Social Services*, ___ U.S. ___, 109 S.Ct. 998 (1989); *Browning-Ferris Industries v. Kelco Disposal, Inc.*, ___ U.S. ___, 109 S.Ct. 2909 (1989).

The fact that Hodari fled when he saw the unmarked brown Dodge is of no consequence. As the state has not contested the insufficiency of that circumstance to constitute a reasonable suspicion, the question posed here concerns what type of police conduct is permissible when the information known to the police does not add up to a reasonable suspicion, specifically, a police cut off and block of a suspect in this fashion, even when they lack reasonable suspicion necessary for an investigative stop. The argument of whether the police can engage in this type of cutting off and blocking of a suspect when their information does not amount to reasonable suspicion necessary for a detention is not cognizable here.

movement" as of the instant Hodari discarded the contraband. (Of course, just seconds later, the officer did wrestle Hodari to the ground.) In any event, neither *Chesternut* nor the civil rights case on which petitioner relies, *Brower v. County of Inyo*, ___ U.S. ___, 103 L.Ed.2d 628 (1989), provides any support for petitioner's novel attempt to graft this additional requirement onto the detention test this Court settled in *Chesternut*.

A. Evolution of the *Mendenhall-Chesternut* Test.

The petitioner wants to use this case to unravel a standard that has its roots in *Terry v. Ohio*, 392 U.S. 1 (1968) and has evolved from decisions in *United States v. Mendenhall*, 446 U.S. 543 (1980), *Florida v. Royer*, 460 U.S. 491 (1983) and culminating in *Michigan v. Chesternut*, 486 U.S. 567 (1988) by saying that this standard is not the complete test in defining what is a Fourth Amendment seizure.

"It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry v. Ohio*, 392 U.S. at 20.

In *United States v. Mendenhall*, 446 U.S. at 554 Justice Stewart writing for himself and then Justice Rehnquist, stated in the opinion, that a person is seized within the meaning of the Fourth Amendment, "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at p. 554 (fn. omitted). The Court provided the following examples of circumstances that might indicate

a seizure: "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.* at p. 554.[2]

In *Florida v. Royer*, 469 U.S. 1 (1984), a plurality opinion applied the same test as *Mendenhall*. The Court later used the same test to analyze immigration officers' factory survey. *INS v. Delgado*, 466 U.S. 210, 215 (1984). And, in *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988), the full Court explicitly adopted the "reasonable person" test set forth in the *Mendenhall* opinion where the police followed the suspect.

This Court held that the appropriate test is whether a reasonable man, viewing the particular police conduct as a whole and within the setting of all the surrounding circumstances, would have concluded that the police had in some way restrained his liberty so that he was not free to leave. *Michigan v. Chesternut*, 486 U.S. at pp. 573-574.

In *Chesternut*, this Court continued that "The test is necessarily imprecise, because it is designed to assess the

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[2] Professor Wayne LaFave in describing the *Mendenhall* test has stated that "[A]n encounter becomes a seizure if the officer engages in conduct which a reasonable man would view as threatening or offensive even if performed by another private citizen. This would include such tactics as pursuing a person who has attempted to terminate the contact by departing, calling to such a person to halt, holding a person's identification papers or other property, *blocking the path of the suspect*, and encircling the suspect by many officers, in addition to the more obvious ones." 3 W. LaFave, Search and Seizure, pp. 413-414 (2d Ed. 1987). [Emphasis added.]

coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation." *Id.* at p. 573. It is an objective test which is broad enough to apply "to the whole range of police conduct in an equally broad range of settings." *Id.* at p. 574.

Both the petitioner and the respondent in *Chesternut* argued for "bright-line" rules. In *Chesternut*, the respondent argued that "any and all police 'chases' are Fourth Amendment seizures." *Id.* at p. 572. The petitioner argued for a rule that "the Fourth Amendment is never implicated until an individual stops in response to the police show of authority." *Id.* at p. 572. *Chesternut* was a compromise between two competing "bright-line" rules. In *Chesternut*, this Court explicitly refused to fashion a "bright-line" rule applicable to all investigatory pursuits and stated, "[W]e adhere to our traditional contextual approach . . . " *Id.* at p. 573.

This Court did not rule that attempting to cut someone off and then blocking his path could not be sufficiently intimidating to constitute a detention. Since *Chesternut*, the test has not changed.

B. This Court Should Not Disturb The Court Of Appeal's Fact-Specific Application of *Chesternut*.

Under the *Mendenhall-Chesternut* case-by-case approach, it is to be expected that in some circumstances aggressive police conduct resulting in a cutting off and a blocking of the suspect's path, will constitute sufficient force or show of authority that a reasonable person

would not feel free to leave.[3] Consistent with the analysis prescribed by *Chesternut*, the Court of Appeal here did not treat any single factor as dispositive, but looked to the totality of the circumstances. Here, in the words of the Court of Appeal, Hodari was caught in a police "pincer maneuver." (J.A. 133.) One police officer pursued Hodari and, more importantly, another officer drove around the block in the opposite direction in anticipation of stopping Hodari. (J.A. 36, 41.) In *Chesternut*, the suspect ran when he saw the police. The police did not activate a siren or flashers nor did they operate the car in an aggressive manner or attempt to block or control the suspect's movement. *Id.* at pp. 574-575. The officers merely *followed* him in an effort "to see where he was going." *Id.* at p. 569. [Emphasis added.]

Moreover, after Hodari left the red car, Hodari apparently knew the police were after him.[4] It is reasonable to assume that, when Hodari saw the officer running toward him, he understood that the officer was connected

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[3] Indeed, Professor Wayne LaFave has suggested that an implicit show of force is present whenever a police officer confronts a citizen. 3 W. LaFave, Search and Seizure, section 9.2(h), p. 410, (2d Ed. 1987). However, no such broad interpretation is necessary to explain the Court of Appeal's conclusion here that the police conduct was sufficiently aggressive and intimidating to convince a reasonable person that he was not free to leave.

[4] The record here will support the inference that whether Hodari saw "POLICE" emblazoned on the jackets of the occupants of the brown Dodge or not, Hodari knew the brown Dodge was an unmarked police car and the occupants were officers before he fled. Otherwise, it is reasonable to assume Hodari and his companions would have continued their conversation at the red car or just walked away when the brown Dodge approached.

to the brown Dodge he had seen moments earlier. This was clearly not a situation where a police officer was running down the street in someone's "general direction" on a benign mission, and the petitioner's speculation, in that regard, is contrary to the facts of this case. (Petitioner's Brief pp. 27, 30.) Taking a course intended to "cut someone off and then charging directly at that person and blocking his path is different that running in someone's "general direction." Indeed, petitioner's characterization of the facts is yet another attempt to have this Court disregard the Court of Appeal's view of the facts and consider the whole case anew – an approach completely contrary to the more deferential standard this Court applied last year in *Minnesota v. Olson*, ___ U.S. ___, 110 S.Ct. 1684 (1990). Clearly, Officer Pertoso's attention was directed toward Hodari. Indeed, he embarked on a course to cut him off. There was no mere surveillance or scrutiny as in *Chesternut*, nor was there any invitation to suggest a consensual encounter. The officer was blocking Hodari's path; he was running directly toward Hodari. It follows that he had a reasonable belief that his freedom of movement was being restricted.

A reasonable person could hardly characterize Officer Pertoso's blocking of Hodari's path as a consensual encounter. *United States v. Berry*, 670 F.2d 583 (5th Cir. 1982) ["[B]locking an individual's path or otherwise intercepting him to prevent his progress is a consideration of great and probably decisive, significance."]; *United States v. Bowles*, 625 F.2d 526 (5th Cir. 1980); *Lopez v. New Mexico*, 783 P.2d 479 (N.M.App. 1989).[5]

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[5] *People v. Manon*, 435 Mich. 1, 457 N.W.2d 623 (1990) which petitioner cites at several points, provides stark contrast

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As the Court of Appeal here stated "This case involves more than a pursuit, as Officer Pertoso did not pursue appellant, but ran in such a fashion *as to cut him off and confront him head on*. Under the rationale of *Chesternut*, this action is reasonably perceived as an intrusion upon one's freedom of movement and as a maneuver intended to block or 'otherwise control the direction or speed' of one's movement." [Emphasis added.] (J.A. 134.) The Court of Appeal, also noted that the "facts of the instant case illustrate a situation tantamount to a physical seizure. Appellant, who was running down the sidewalk, had his physical freedom of movement sufficiently blocked by the presence of a police officer, wearing a

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to the facts of this case. Factually, *Manon* was practically a clone of *Chesternut* itself. The police simply followed a running suspect on foot. They did not attempt to block his path. "[T]hey never attempted to force the defendant to run in a direction other than the one chosen by him. . . ." *Id.* 435 Mich. at p. 12, 457 N.W.2d at 627. The only difference between the facts of *Chesternut* and those of *Manon* was that in the former the police followed in a car and in the latter they did so on foot. Consistent with *Chesternut's* refusal to replace the "reasonable person" test with a set of mechanical rules, the Michigan court concluded that this distinction, by itself, was insufficient to transform the police conduct into a detention. "Put simply, the police never exhibited any show of authority which would indicate to a reasonable person that he was not free to leave." *Id.* 435 Mich. p. 12, 457 N.W.2d at 628. Far from calling into question the soundness of *Hodari D.* or similar state cases (such as *Lemmon*), *Manon* demonstrates simply that the *Chesternut* test works. State courts are quite able to distinguish between police conduct which effectively restrains a person's freedom to leave and police conduct which does not.

jacket marked 'police,' who was 11 feet away and running toward him." (J.A. 137, n.4.)

After cutting him off, Officer Pertoso, intent on stopping Hodari, ran directly at Hodari to block his path. (J.A. 44.) In *Chesternut*, there were no actions by the police officers to control the direction of the suspect or to block his path.

Despite the lack of precedent, the petitioner and the Solicitor General are asking this Court to repudiate its holding just two-and-a-half years ago in *Chesternut*. The petitioner cites *Brower v. County of Inyo*, ___ U.S. ___, 103 L.Ed.2d 628, 635 (1989) for the proposition that in order for there to be a Fourth Amendment seizure there must be "a termination of movement through means intentionally applied" thereby establishing a new prong to the *Mendenhall-Royer-Chesternut* reasonable person test. The petitioner has not cited any case that has adopted the use of *Brower* to establish this new prong.

Since this is an objective test, Hodari was detained before he was physically wrestled to the ground by Officer Pertoso because a reasonable person in his position would not have felt free to leave.

By not recognizing certain police conduct, i.e., running in a manner to cut someone off and then charging at him in an effort to block his path, the petitioner's position would allow just the kind of coercive police conduct (harassment without reasonable suspicion) that *Terry v. Ohio*, 392 U.S. 1 (1968) and its progeny intended to prevent. Officer Pertoso's blocking of Hodari's path was

considerably more than a benign police – citizen encounter. *Hawkins v. State*, 255 Tex.Cr.App., 758 S.W.2d 255 (1988).

Thus, the approach taken by the California Court of Appeal in *Hodari D.* is consistent with the approach taken by courts in other states, i.e., each case is decided on a fact by fact basis. *Lopez v. New Mexico*, 783 P.2d 479 (N.M.App. 1989); *State v. Lemmon*, 568 A.2d (Md. 1990). Here, the proper legal standard is that set forth in *United States v. Mendenhall*, 446 U.S. 544 (1980) and followed in *Michigan v. Chesternut*, 486 U.S. 567 (1988) and the Court of Appeal in *Hodari D.* applied the proper legal standard.

As a very recent opinion of this Court indicates, under these circumstances, a state appellate court's fact-specific application of the proper constitutional standard is entitled to some degree of deference.

In *Minnesota v. Olson*, ___ U.S. ___, 110 S.Ct. 1684 (1990) a Fourth Amendment case, this Court found that the Minnesota Supreme Court applied the correct standard in determining whether exigent circumstances existed when a defendant was arrested in his house without a warrant. This Court said, "We are not inclined to disagree with this fact-specific application of the proper legal standard." *Id* at p. 1690.

Deference should be given to the Court of Appeal here just as this Court did in *Minnesota v. Olson*, ___ U.S. ___, 110 S.Ct. 1684 (1990). Because the Court of Appeal

applied the proper standard to a fact-specific situation, this Court should decline to disturb the Court of Appeal's application of the reasonable person standard just as it did in *Minnesota v. Olson*, ___ U.S. ___, 110 S.Ct. 1684 (1990).[6]

The rationale of *Minnesota v. Olson* is equally applicable to this case. *Olson* reflects this Court's recognition that, where it has spelled out the legal standard governing a particular Fourth Amendment issue, state courts can generally be trusted to administer that standard. In *Chesternut*, this Court made clear that the *Mendenhall* "reasonable person" test provided the proper framework for assessing whether police conduct was sufficiently intimidating to constitute a detention. In its discussion, it also identified several factors relevant to this determination, such as whether the police blocked or controlled the direction of the suspect. In its opinion, the state appellate court thoughtfully applied the *Chesternut* analysis to the facts before it, drawing extensively from the discussion in *Chesternut*. Throughout its brief, petitioner basically asks this Court to reweigh the circumstances and substitute its conclusions for those of the state court. As *Olson* reflects, that is not this Court's role. The Court of Appeal's conclusion that Hodari was not free to leave was a reasonable one, and this Court should not disturb it.

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[6] Justice Kennedy's concurring opinion emphasized that in deferring to the state court's application of the proper standard to a particular set of facts, the Supreme Court was not necessarily endorsing that application.

C. *Chesternut* Remains The Proper Test, And There Is No Additional Requirement of Physical Restraint.

Despite the Court of Appeal's proper application of the *Mendenhall-Chesternut* standard, the petitioner wants to replace the standard that has evolved by saying that this standard is not the complete test in defining a seizure under the Fourth Amendment. Petitioner contends that *Mendenhall* and *Chesternut* do not state the complete test for a seizure, but "*[M]endenhall* explicates only the requirement of a show of authority, defining it as official conduct which would cause a reasonable person to believe that he is not free to leave." (Petitioner's Brief p. 17.) Petitioner wants this court to add the requirement that there be a "physical restraint" on the suspect.

In so arguing, the petitioner and the Solicitor General assert that in order for there to be a Fourth Amendment seizure there must be "a termination of movement through means intentionally applied" thereby establishing a new prong to the *Mendenhall-Royer-Chesternut* reasonable person test. The petitioner and Solicitor General are asking this Court to repudiate its holding just two-and-a-half years ago in *Chesternut*.

In *Chesternut*, this Court explicitly declined to adopt the rule that the petitioner is urging now, i.e. an inflexible rule on what constitutes a seizure of a fleeing individual, that is, a physical restraint rule. Instead, *Chesternut* established a fact oriented test.

The petitioner and the Solicitor General are flatly wrong in their assertions that *Chesternut* did not address whether physical restraint or termination of movement is

a prerequisite for recognition of a detention. This is exactly the position which the state of Michigan advanced in *Chesternut:* "Petitioner argues that the Fourth Amendment is never implicated until an individual stops in response to the police's show of authority. Thus, petitioner would have us rule that a lack of objective and particularized suspicion would not poison police conduct, no matter how coercive, as long as the police did not succeed in actually apprehending the individual." *Id.* at p. 572.

The court in *Chesternut* did not merely find it unnecessary to consider this question, as petitioner now suggests. *Chesternut* addressed and squarely rejected the proposition.

The test originally articulated by Justice Stewart in *Mendenhall* and adopted by the full Court in *Chesternut* finds its roots in *Terry v. Ohio*, 392 U.S. 1 (1968) and its many progeny. Both petitioner and the Solicitor General attempt to invoke *Terry*, but fail to recognize the significance of the very language they cite: "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." 392 U.S. at 19 n. 16 (Quoted in United States Brief at p. 13). Yet, it is obvious that restraint on a citizen's liberty may occur, before he is actually brought to a halt.[7]

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[7] Much the same can be said about language quoted by the Solicitor General in from a 19th century maritime case: "The parties must understand that they are dispossessed, and they are no longer at liberty to exercise any dominion on board of

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Indeed, this recognition underlies the *Mendenhall-Chesternut* test: where the police, through force or a show of authority, communicate to a reasonable person that he is not free to leave, his liberty is restrained as of that moment. Petitioner makes the same mistake in declaring, "We can discover no case in which this Court has found a seizure in the absence of termination of freedom of movement, either through the use of force or display of authority." (Petitioner's Brief pp. 18-19.) But, petitioner is urging more than a "freedom of movement" standard. Petitioner would replace the current "contextual" examination of whether the individual's freedom has been restrained, with a mechanical inquiry into whether and when the individual was *physically* restrained or came to a standstill.

Although *Chesternut* explicitly rejected a "bright-line" physical restraint test of the type urged by the petitioner, petitioner nonetheless suggests the Court adopted just such a test in *Brower v. County of Inyo*, ___ U.S. ___, 103 L.Ed.2d 628 (1989). *Brower* was a wrongful death/civil rights suit arising out of a fatal collision into a police roadblock. Thus, it involved an actual physical termination of movement of the most dramatic kind. Unlike *Chesternut* and this case, it did not involve any ambiguities as to the moment at which a Fourth Amendment seizure occurs. Instead, the *Brower* opinion simply

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the ship." *The Josefa Segunda*, 23 U.S. (10 Wheat.) 312, 325 (1825) (Quoted in United States Brief at pp. 11-12). Just like the *Mendenhall-Chesternut* standard, this quote focuses upon whether the official conduct communicated to the other party that he was not free to control the ship.

explicated the requirement that only *willful* police conduct will effect a Fourth Amendment seizure. *Brower v. County of Inyo*, 103 L.Ed.2d at p. 635.

Petitioner appears to believe that this Court in *Brower* was rewriting the law of search and seizure by sleight of hand. It is wholly unreasonable to suggest that this Court used a civil rights case involving unrelated issues to make, in dictum, so fundamental a change in the detention standard. It is even less plausible to believe the Court would effect such a change without referring to or discussing a single case which it was modifying, clarifying or repudiating. Having refused the previous year in *Chesternut* to adopt a physical restraint rule, the Court certainly did not intend to repudiate *Chesternut* sub silentio in a case not even posing the issue.

The petitioner has not cited any case that has adopted its anomalous interpretation of *Brower* to establish this new "physical restraint" prong. In fact, state courts have rejected the notion that Brower modified or changed the holding in *Chesternut*. In *State v. Lemmon*, 568 A.2d 48 (Md. 1990) police officers chased Lemmon on foot and with a police car in an attempt to cut Lemmon off. The court rejected any notion that no seizure takes place until the restraining effect of a police command actually occurs, i.e., when the person is within the police officer's physical control. The Court of Appeal went on to say "[W]e believe that *Brower* is in no way inconsistent with *Chesternut* and leaves *Chesternut* intact in all material aspects." *Id.* at p. 574. Similarly, in *Lopez v. New Mexico*, 783 P.2d 479 (N.M.App. 1989), police officers used their van to block a suspect's vehicle. *Lopez* read *Brower* as

consistent with the principle that "[B]locking a subject's vehicle is a form of physical restraint." *Id.* at p. 482.[8]

The analysis of this same issue by petitioner in another very recent California case reveals the hazards of the state's physical restraint test. In *People v. Verin*, 220 Cal.App.3d 551, 269 Cal.Rptr. 573 (1990), the California Attorney General, relying on the same interpretation of *Brower* advanced here, argued that there was no detention because, rather than freeze immediately, the defendant had taken two steps forward after being ordered to halt. The state court concluded that the *Brower* dictum merely referred to the willfulness of the police conduct and was not intended to establish a termination of movement requirement.

The state's argument failed in *Verin*, just as it should here. Nonetheless, the facts of *Verin* demonstrate the pitfalls of the state's argument here. First, a physical restraint rule would not provide the workable, easily administered, "bright-line" rule which the state promises. There would still be endless litigation over whether a suspect has come to a complete stop or otherwise manifested his acquiescence in the seizure. Further, such a rule certainly will not serve the purposes of the Fourth

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[8] Similarly, of course, numerous earlier cases have held that physical restraint is not required for a detention. (See *Swicegood v. State*, 448 So.2d 433 (Ala.Cr.App. 1983), *People v. Thomas*, 660 P.2d 1272 (Colo. 1983), and *People v. Washington*, 192 Cal.App.3rd 1120, 238 Cal.Rptr. 840 (1987), [abandoned contraband was suppressed in each case because of police chases held to constitute illegal detentions]).

Amendment since it will shift the inquiry from the behavior of the police – the core concern of the Amendment – to the subjective reactions of a particular suspect. This is the very reason the Court in *Chesternut* eschewed such a test and adhered to the traditional "objective" formulation. As this Court stated in *Chesternut*,

> The test's objective standard – looking to the reasonable man's interpretation of the conduct in question – allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment. 3 W. LaFave, Search and Seizure section 9.2(h), pp. 407-408 (2d ed. 1987 and 1988 Supp). This reasonable person standard also ensures that the scope of Fourth Amendment protections does not vary with the state of mind of the particular individual being approached. 486 U.S. at 574.[9]

The Petitioner and Solicitor General appear to disagree over the importance of this case. The Solicitor General suggests that very few cases will be affected by this Court's decision. Petitioner, however, is correct in believing otherwise. Petitioner describes this as a scenario which occurs almost daily on the streets of our nation's cities. (Petitioner's Brief p. 9.) The proliferation of lower

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[9] Professor Wayne LaFave, states that "The 'free to leave' concept, in other words, has nothing to do with a particular suspect's choice to flee rather than to submit or with his assessment of the probability of successful flight. Were it otherwise, police would be encouraged to utilize a very threatening but sufficiently slow chase as an evidence-gathering technique whenever they lack even the reasonable suspicion needed for a *Terry* stop." 3 W. LaFave, Search and Seizure, (1990 Supp.) section 9.2, page 39.

court cases involving permutations of the chase-and-discard sequence appears to confirm this assertion. Yet, the very frequency with which these "chases" occur should be further cause for rejection of petitioner's proposed standard.

It bears emphasis that the question of whether a particular pursuit constituted an illegal detention will only arise in those cases in which the police *lack* a reasonable suspicion basis for such a detention. As the cases reflect, it is quite common for police action such as this to panic the individual into discarding evidence.[10] (See *Swicegood v. State*, 448 So.2d 433 (Ala.Cr.App. 1983), *People v. Thomas*, 660 P.2d 1272 (Colo. 1983), and *People v. Washington*, 192 Cap.App.3rd 1120, 238 Cal.Rptr. 840 (1987), [abandoned contraband was suppressed in each case because of police chases held to constitute illegal detentions]).

Yet, petitioner would remove *all* such cut-off maneuvers like this one here from the purview of the Fourth

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[10] One commentator has characterized this scenario as follows: "If, however, the officer, without benefit of probable cause, and acting strictly on a 'hunch,' or because of suspicion based upon personal knowledge or hearsay, decides to follow the individual, and proceeds to hound him in a harassing manner, hoping that the individual will panic in the belief that he had better 'ditch the stuff' before there is a shakedown, then an issue of major constitutional proportions will arise." E. Mascolo, The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis, 20 Buff.L.Rev. 416, 417 (1971).

Amendment – including those sufficiently intimidating to meet the *Mendenhall-Chesternut* test.[11]

The lesson of this Court's Fourth Amendment jurisprudence is that, unless they possess an objective reasonable suspicion, the police may not engage in conduct which would communicate to a reasonable person that he is not free to leave. A physical restraint test, however, would effectively reward such conduct in the very common situation in which the individual discards evidence after his freedom has been restrained but before he actually comes to a halt.

The opinion in *Brower* gave no indication that this Court was re-writing Fourth Amendment law. *Brower* did not even mention *Mendenhall* or *Chesternut*. Instead, following-up on its decision in *Tennessee v. Garner*, 471 U.S. 1 (1985), *Brower* simply held that an individual who collided into a police roadblock had been seized within the meaning of the Fourth Amendment since the police conduct had been willful. Moreover, the *Brower* opinion never suggested that its discussion of the seizure there was intended to modify, replace, or supplant the definition in *Chesternut*.

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[11] Thus, it is unclear why petitioner feels that a major change to a "bright-line" rule is needed for these cases. Petitioner's fears that the existing *Chesternut* test is insufficient are unfounded. The *Chesternut-Mendenhall* approach will *not* affect lawful police behavior. The police may follow any individual as long as their actions are not so intimidating that a reasonable person would feel his liberty was restrained. Further, if the police have reasonable suspicion, they may chase and detain any person. Thus *only* coercive police actions taken without reasonable suspicion will be deterred under the existing tests.

In *Chesternut*, this Court had an opportunity to adopt the inflexible requirement of a physical restraint rule that the petitioner puts forth and declined to do so. It is ridiculous for petitioner to suggest that in a case (*Brower* was a civil rights case) not dealing with the seizure issue in a criminal law context, this Court meant to re-write Fourth Amendment law with respect to detentions and do away with the reasonable person test set forth in *Mendenhall* and followed in *Chesternut*.

The majority opinion in *Chesternut* provides the analytical framework for the kind of issue presented here.

There is inherent danger in suggesting that by adding a physical restraint requirement to the *Mendenhall-Chesternut* test, the police and the lower courts will have a test that is easy to apply. Unfortunately, citizen-police encounters are amorphous, and a physical restraint rule will not be a panacea for the police or the lower courts. For example, how much physical restraint is necessary to implicate the protection of the Fourth Amendment? The danger to the suspect and the police officer is apparent in the process of applying the physical restraint. Also, what if a police officer approaches a citizen and turns on his siren, draws his weapon, or shoots over the head of someone and that person continues to flee? It appears that this police conduct would not constitute a seizure. Can the police be trusted with this much discretion?[12] As one can see, the possible scenarios are numerous.

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[12] One commentator has suggested that this area is better off left unexplored. M. Tracy Maclin, The Decline Of The Right Of Locomotion: The Fourth Amendment On The Streets, 75 Cornell L.Rev. 1313 (1990)

Petitioner's test would be unworkable and, most important, would disserve the purposes of the Fourth Amendment. That amendment is directed to police conduct. Its purpose is " 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.' " *INS v. Delgado*, 466 U.S. at 215, quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 544 (1976). However, petitioner's formula would effectively replace scrutiny of the police conduct with a mechanistic inquiry into the individual suspect's subjective response to the police conduct. Incongruously, intimidating police conduct, not supported by a reasonable suspicion – conduct which would convince a reasonable person he was not free to leave – would be legal up to the moment the suspect actually was physically apprehended. Thus, the legality of the police conduct would depend upon how the individual later responded to it.

As the cases in this area demonstrate, evidence is often obtained during that narrow interval between the police use of force or show of authority and the individual's physical apprehension. Petitioner proposes to take all such cases out of the Fourth Amendment – despite the fact that, when the police engaged in the coercive conduct, they had no reasonable basis under *Terry* for doing so.

There is no telling just how often police officers rush, block off or aggressively pursue individuals in the manner involved here, despite the lack of a reasonable suspicion – it is only the incidents which produce evidence which wind up in court. However, the frequency with which such issues arise in criminal cases throughout the country suggest it is a frequent police practice. In many

cases – and certainly in this one – the police conduct is sufficiently restraining that a reasonable person would not feel free to leave. However, if petitioner's test is adopted, there will be no remedy and thus no deterrent for such behavior, for the Fourth Amendment will not be implicated unless and until there is a physical restraint or actual termination of movement.

In *Terry* and again in *Chesternut*, this Court refused to dilute the protections of the Fourth Amendment with so artificial and formalistic an interpretation of its proscription against unreasonable searches and seizures. "In our view the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the police upon personal security . . . " *Terry, supra*, 392 at p. 18 n. 15. Most significantly, in *Chesternut*, the Court recognized that a "bright-line" rule such as the state urges would leave unchecked "police conduct, no matter how coercive, as long as the police did not succeed in actually apprehending the individual." *Chesternut*, 486 U.S. at p. 572.

California, as petitioner here, is simply recycling the same argument advanced by Michigan in *Chesternut*. Petitioner offers no compelling reason for this Court to repudiate the "traditional contexutal approach" which it embraced so clearly in *Chesternut*. Certainly, *Brower*, a wrongful death case bearing no resemblance to detention cases like this, does not supplant the *Chesternut* test. Since the state court here applied the proper *Chesternut* standard in view of all the circumstances surrounding the incident, this Court should accord it the same deference as in *Minnesota v. Olson* and affirm the judgment.

Court of Appeals's conclusion that Royer was being illegally detained when he consented to the search of his luggage, we agree that the consent was tainted by the illegality and ineffective to justify the search." *Id.* at pp. 507-508.

Unquestionably, all the *Brown* factors support the Court of Appeal's determination here that the causal link was not severed. Hodari's discarding of the rock was *contemporaneous* with the police conduct which effected the illegal seizure – he discarded the rock immediately upon seeing the officer running straight at him from only a few feet away. For the same reason, there could be no intervening circumstances purging the taint. Again, *Brown* and its progeny are instructive. In *Brown* and *Dunaway*, there were 2-hour intervals between the illegal seizures and the confessions and the respective defendants were advised of and waived their *Miranda* rights. Yet, in each case, the Court found the state had failed to sustain its burden of establishing that the defendant's statement was sufficiently a product of free will to break the causal connection.

In *Taylor*, this Court found unpersuasive the state's argument that the defendant had every opportunity to reflect upon his situation and consider his options and that his statement therefore reflected an exercise of free will. *Taylor v. Alabama*, 457 U.S. at p. 687. Petitioner's argument here – asserting that Hodari freely made the choice to abandon the rock as an act of "self-help" – is simply a retread of the argument rejected in *Taylor*, and an implausible one at that. If a defendant's properly *Mirandized* statement is not sufficiently a "product of free will" to purge the taint of an illegal seizure two hours

earlier, then surely neither is a minor's startled instantaneous response to a police officer cutting him off and running right at him.

Petitioner's position is all the more difficult to sustain in light of applicable burden and standard of review. Under *Brown* and its progeny, the burden was squarely on the state to establish that the discarded evidence was not tainted by the contemporaneous Fourth Amendment violation. *Brown v. Illinois*, 422 U.S. at p. 504. Here, the Court of Appeal, carefully reviewing each of the *Brown* factors, concluded that the state had not sustained its burden. Moreover, on the detention issue discussed in Part I, *Minnesota v. Olson*, ___ U.S. ___, 110 S.Ct. 1684 (1990) should guide this Court's review. The Court should be very reluctant to disturb the state court's fact-specific application of the correct legal standard (*Brown*) to a particular set of circumstances.

In *Brown* and its subsequent cases, the Court has placed greatest emphasis on the final factor, "the purpose and flagrancy of the official misconduct." As discussed and confirmed by the many state cases on this subject elsewhere in this brief, it is quite common for an individual confronted by a police force or show of authority to attempt to discard incriminating evidence. This is not an unexpected bonus; it is an entirely foreseeable outcome of this type of detention.

Here, the police pursued Hodari, cut off his path, and ran head-on at him – even though they had no reasonable suspicion basis to detain him. Again, this Court's observations in *Brown* are apropos: Clearly, the police "embarked upon this expedition for evidence in hope

something might turn up. The manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright and confusion." *Id.* at p. 590. So too, Hodari was quite predictably, "startled" at the sight of the officer rushing at him and panicked. (J.A. 46.)

The close causal connection between the illegal conduct and the acquisition of the evidence bears upon the final *Brown* factor, the flagrancy of the misconduct, as well as on the temporal proximity and intervening circumstances factors. "When there is a close causal connection between the illegal seizure and the confession, not only is exclusion of the evidence more likely to deter similar police misconduct in the future, but also use of the evidence is more likely to compromise the integrity of the courts." *Dunaway v. New York*, 442 U.S. at 218.

Not surprisingly, the petitioner and the Solicitor General devote little discussion to the impact of this case on the deterrent purposes of the exclusionary rule. As the many lower court cases cited in the brief demonstrate, the detention-and-discard scenario is a very common one. It is not limited to cases in which police pursue or block the path of a suspect. It also recurs during other types of detentions, such as when an officer verbally commands a suspect to stop. E.g. *People v. Verin*, 220 Cal.App.3d 551, 269 Cal.Rptr. 573 (1990). In *Hawkins v. State*, 758 S.W.2d 255, 259, (Tex.Cr.App. 1988), the Texas Court of Criminal Appeals surveyed decisions on this subject from various other states and concluded: "These cases . . . make it clear that if an accused abandons property in response to unlawful police misconduct, the abandonment will not be

considered a voluntary or independent act and thus the protections of the Fourth Amendment will apply."

Cases throughout the United States reflect that it is not uncommon for a suspect confronted with kind of show of authority present here to throw down contraband that he happens to have. *Hawkins v. State*, 758 S.W.2d 255 (Tex.Cr.App. 1988); *People v. McFadden*, 524 N.Y.S.2d 902 (A.D. 1988); *Moss v. Commonwealth*, 373 S.E.2d 170 (Va.App. 1983); *Settle v. State*, 679 S.W.2d 10 (Mo.App. 1984); *United States v. Beck*, 602 F.2d 726, (5th Cir. 1979), [An abandonment that is the product of police misconduct is not voluntary and cannot, therefore, vitiate the taint of an illegal detention.]; *People v. Menifee*, 100 Cal.App.3d 235, 160 Cal.Rptr. 682 (1979); *People v. Washington*, 192 Cal.App.3d 235, 160 Cal.Rptr. 682 (1979); *Commonwealth v. Barnett*, 484 Pa. 211, 398 So.2d 1019 (1979); *Commonwealth v. Jeffries*, 454 Pa. 320, 311 A.2d 914 (1973). [In the cases cited, each court found an involuntary abandonment of contraband as a result of police misconduct.]

The petitioner does not and cannot claim that the cases throughout the country are in a state of disarray on the abandonment of contraband because it is quite foreseeable that a defendant faced with an illegal detention will try to discard contraband. On the contrary, both federal and state decisions recognize that evidence thrown down or discarded upon an illegal detention is not a voluntary abandonment as petitioner claims. This kind of scenario must be policed by the Fourth Amendment. The link between these two events, i.e., the illegal detention and the discarding is a close and recurring one and that is why a common sense approach must be taken

and say that the abandonment is the fruit of the illegal act.

This does not mean that a defendant can "immunize" himself every time he sees a police officer approaching as petitioner would have this court believe. Petitioner claims that the Court of Appeal has created a new constitutional right in that it gives a suspect a right to a "preemptive form of self-help" whereby "the right of person who fears detention by a police officer [can] immunize himself from prosecution by discarding incriminating evidence on his person." (Petitioner's Brief p. 60.) It has done nothing of the sort. Discarded evidence will only be subject to suppression where (1) the police lacked a reasonable suspicion but (2) nonetheless engage in a use of force or show of authority which would communicate to a reasonable person that he was not free to leave. Where the police merely approach or follow an individual without restraining his freedom to leave, as in *Chesternut*, there has been no illegal detention and the exclusionary rule does not come into play. Similarly, where the police have reasonable grounds to detain someone and he precipitously discards the contraband, the evidence poses no Fourth Amendment problem. Discarded evidence will be subject to suppression only if the police have acted illegally by engaging in coercive conduct, when they lack the basis for a detention.

Here, the object of the officers' pursuit and cutting off of Hodari was the acquisition of evidence. The officers wanted to stop these young men, to find out who they were, and to find out what they were about. What occurred was exactly what Officer Pertoso and Officer McGoglin hoped would occur. They had a hunch about

this group of young Black men. And, they hoped their actions would provoke Hodari into a panic thereby inculpating himself – that is exactly what happened. And, since the officers lacked a reasonable suspicion basis for such conduct, that is exactly what the exclusionary rule is designed to prevent.

This was not a fortuitous windfall. This is exactly what the police officers would expect to come out of this scenario.

In the Fourth Amendment context, quite simply, the assumption that the officer must intend to conduct a search for evidence is wrong. This is a case of police misconduct panicking Hodari into abandoning contraband. One commentator has stated that "In the real world, few people are aware of their Fourth Amendment rights, many individuals are fearful of the police, and police officers know how to exploit that fear. M. Tracy Maclin, The Decline Of The Right Of Locomotion: The Fourth Amendment On The Streets, 75 Cornell L.Rev. 1301 (1990), citing Professor H. Richard Uviller, *Tempered Zeal* (1988) at p. 16. Another commentator has characterized this scenario as follows:

> Since the individual cannot possibly know in advance how far the officer will go, he has no way of gauging a prudent course. If the officer continues to close in, the individual has to anticipate a search. To do nothing means certain discovery. To attempt a discard [90] is to invite a retrieve, thereby giving the officer probable cause to arrest.

Fn. 90: Undoubtedly, some individuals will opt in favor of discard, in the mistaken belief that they will not be prosecuted for a possessory offense if the goods are not discovered in the Law of search and seizure. E. Mascolo, The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis, 20 Buff.L.Rev. 416, 417 (1971).

Petitioner cites *Brower v. Inyo County*, ___ U.S. ___, 103 L.Ed.2d 628 (1989) as "compelling" authority for the proposition that "[T]he officer must intend to conduct a search for evidence." (Petitioner's Brief pg. 51.) However, the facts in *Brower*, a fatal collision into a roadblock, did not even remotely involve any issue with respect to abandonment or intent to search for evidence.

Brower cited *Hester v. United States*, 265 U.S. 57 (1924) to illustrate its holding that only *willful* police conduct implicates the Fourth Amendment. *Brower v. County of Inyo*, 103 L.Ed.2d at p. 635. *Hester* was a three paragraph opinion without much discussion. In *Hester*, revenue officers entered into an open field and gave chase after two moonshiners who dropped their whiskey bottles at the sight of the officers. The bottles were seized by the revenue officers. The *Hester* court specifically stated that it was deciding the case on the "open fields" doctrine: "The distinction between the latter [open fields] and the house is as old as the common law." *Id.* at p. 58. Therefore, there was no Fourth Amendment protection in the open field. Thus, in *Hester* there was no Fourth Amendment violation in the first place. *Hester* antedates most of this Court's jurisprudence on the 4th Amendment. In particular, *Hester* was decided prior to any of this Court's development of the fruits of the poisonous tree under *Wong Sun v.*

United States, 371 U.S. 471 (1963) and cases like *United States v. Crews*, 445 U.S. 463 (1980). Thus, *Hester* had no occasion to consider the "fruits" doctrine. This Court's citation of *Hester* to show the requirement of willful police conduct certainly does not mean that this Court intended to supplant, with a citation to a 1924 case, all the Fourth Amendment jurisprudence that has been developed in the past through *Wong Sun*, *Brown*, and their progeny.

Brower, a civil rights wrongful death case, involved no issue of the "fruits" of a Fourth Amendment violation and therefore it has no bearing on the fruit of the poisonous tree. "The *Brower* majority merely says that in *Hester* the police action did not constitute a seizure of the bottles, a conclusion which casts no doubt upon the proposition I have stated above: that in a *Hester*-type situation the police acquisition of the bottles may constitute the fruit of an earlier manifested police attempt to seize a person.[Fn.]" (3 W. LaFave, Search & Seizure (1990 Supp.) section 9.2 at p. 40.) It is one thing to say that when a fleeing suspect abandons contraband, the police have not "seized" the contraband. However, that does not preclude the possibility, as discussed by LaFave, that the contraband may nonetheless be a fruit of the seizure of the individuals. Indeed, the fruits of an illegal seizure may include many kinds of evidence such as a confession or identification, which, strictly speaking, have not been seized.

The exclusionary rule comes into play if and only if the police conduct is so restraining that a reasonable person would not feel free to leave. Hence, just as in

Chesternut, the usual police approach of a citizen will have no such effect, so there is no danger that abandoned property will be suppressed where the police have done nothing illegal. Conversely, however, where the police have illegally detained someone, the fruits of that detention must be determined under the test of *Brown*, *Dunaway*, and their progeny and not *Brower*.

In *Hodari D.*, the discarding of contraband was contemporaneous with the illegal police conduct of seizing Hodari. The only real difference between this case and the *Brown* line of cases is that the latter involved what suspects verbally divulged after the seizure. Thus, here the case for suppression is even stronger than in cases like *Brown* because the link between the illegality and the evidence is still tighter.

Chesternut indicates that the exclusionary rule will have no application where an officer merely approaches a defendant or engages in a conversation or otherwise initiates a consensual encounter. In other words, it has no application where the officer does not detain the suspect. Only when a police officer illegally restrains a defendant under the *Mendenhall-Chesternut* test does the exclusionary rule come into play at all. The situation in which a police officer either by force or a show of authority communicates to a person that he is not free to leave despite the lack of a reasonable suspicion is precisely the kind of situation that should be covered by the exclusionary rule.

The petitioner's position would undermine the deterrent effect of the exclusionary rule. As the proliferation of state abandonment cases illustrates – this is a common scenario. The issue only arises when the initial police

conduct, the detention, is illegal. Yet, to adopt petitioner's proposed rule, would reward such conduct.

The purpose of the exclusionary rule is to deter the kind of police misconduct that is illustrated by this case. The exclusionary rule would be meaningless if it allowed police officers to harass people without reasonable suspicion and any contraband that was dropped in an illegal encounter could then come in on the theory that the act that revealed it was voluntary even if the detention was not.

"Abandonment" analysis make sense where the act is wholly voluntary and not induced by police illegality. It is a far different matter where an individual discards contraband at the very moment of and in direct response to an illegal detention. All the factors the Court has found relevant in other "fruits" situations – temporal proximity, lack of intervening circumstances, the nature of the official misconduct – militate in favor of the conclusion reached by many state and federal courts which have considered the subject. Such discarded property is just as much a fruit of an illegal detention as a statement (as in the *Brown* cases) or a consent (as in Royer). Indeed, the case for suppression of such evidence is even stronger than in those cases because a panicked response to an illegal police use of force or show of authority is even less voluntary than a consent or *Mirandized* statement given later in the course of a detention.

The Court of Appeal put it succinctly, "To say the police did not obtain the evidence through exploitation of their illegal activity would be a fiction." (J.A. 143.) Since

the evidence in *Hodari D.* was abandoned contemporaneously with an illegal seizure the Fourth Amendment exclusionary rule came into play. The California Court of Appeal followed *Brown* and its progeny and took a common sense approach applying the *Mendenhall-Chesternut* test to a fact-specific situation. There was ample support for the Court of Appeal's finding that the contraband was the fruit of the illegal detention, and its decision should not be disturbed.

CONCLUSION

The judgment of the California Court of Appeal for the First Appellate District should be affirmed.

Respectfully submitted,

JAMES L. LOZENSKI
(Appointed by this Court)
1600 Shattuck Avenue
Suite 200-4
Berkeley, CA 94709
[415] 486-0612

Counsel for Respondent

Of Counsel:

J. BRADLEY O'CONNELL
Staff Attorney
First District Appellate Project
730 Harrison Street
Suite 201
San Francisco, CA 94107
(415) 495-3119